90-1219 (2)

Supreme Court, U.S.
FILED
JAN 15 1991
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO.
UNITED STATES SUPREME COURT
(1990 TERM)

FRED J. TOCCO
Petitioner

v.

NEW JERSEY COUNCIL ON AFFORDABLE HOUSING,

Respondent

and

TOWNSHIP OF CHERRY HILL,

Respondent.

APPENDIX TO PETITION FOR CERTIORARI FROM A FINAL DECISION OF THE NEW JERSEY SUPREME COURT (1990 TERM)

BRANDT, HAUGHEY, PENBERTHY,
LEWIS & HYLAND, P.A.
240 West Route 38
Moorestown, NJ 08057

On the Petition:
S. David Brandt, Esq.
Patrick F. McAndrew, Esq.

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SUPREME COURT OF NEW JERSEY
C-236 September Term 1990
33,326

Filed
Supreme Court
October 22, 1990
Stephen W. Townsend
Clerk

FRED J. TOCCO,
Plaintiff-Petitioner,

v.

NEW JERSEY COUNCIL ON AFFORDABLE HOUSING,
Defendant-Third Party
Plaintiff-Respondent,

and

TOWNSHIP OF CHERRY HILL,
Third-Party Defendant-Respondent.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-6301-88T2 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

Pal

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton this 16th day of October, 1990.

/s/ Stephen W. Townsend
CLERK OF THE SUPERIOR COURT

576 A.2d 327

FRED J. TOCCO, PLAINTIFF-APPELLANT,
V. NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING, DEFENDANT-
THIRD-PARTY PLAINTIFF/RESPONDENT,
V. TOWNSHIP OF CHERRY HILL,
THIRD-PARTY DEFENDANT/RESPONDENT.

Superior Court of New Jersey
Appellate Division

Argued May 1, 1990–Decided July 3, 1990

SYNOPSIS

Property owner brought suit, in which he alleged that 18-month land development moratorium constituted unconstitutional "taking" within meaning of Fifth Amendment. The Superior Court, Law Division, Atlantic City, granted defendant's motion for summary judgment, and plaintiff appealed. The Superior Court, Appellate Division, Arnold M. Stein, J.A.D., held that 18-month land development moratorium imposed on municipality in which land was scarce, to enable mu-

nicipality to provide for its fair share of low and moderate income housing, was not unconstitutional.

Affirmed.

Before Judges ANTELL, ASHBEY and ARNOLD M. STEIN.

S. David Brandt argued the cause for appellate (Brandt, Haughey, Penberthy, Lewis & Hyland, P.C., attorneys; Patrick F. McAndrew and S. David Brandt on the brief; Patrick F. McAndrew on the reply letter brief.)

Gerald Callahan, Deputy Attorney General, argued the cause for respondent Council on Affordable Housing (Robert J. DelTufo, Attorney General; Mary C. Jacobson, Deputy Attorney General, of counsel; Geraldine Callahan on the brief).

Francine I. Axelrad argued the cause for respondent Township of Cherry Hill.

The opinion of the court was delivered by

ARNOLD M. STEIN, J.A.D.

Plaintiff appeals the order granting summary judgment to defendant-third-party plaintiff Council on Affordable Housing (COAH) and dismissing the complaint. In a comprehensive oral opinion, Judge Gibson ruled that COAH's imposition of an eighteen-month moratorium on the development of certain lands in Cherry Hill Township was not an unconstitutional taking of plaintiff's affected property. U.S. Const., Amend. V and XIV; N.J. Const. (1947), Art. I, ¶20. We agree and affirm.

Plaintiff is the owner of 140 acres in Cherry Hill. In May 1985, a complaint was filed in the Law Division (Fair Share Housing Center, Inc., et al. v. Township of Cherry Hill, Docket No. L-042750-85P.W.), alleging that the township had failed to provide for a fair share of its region's present and prospective needs for low and moderate income housing. N.J. Const. (1947), Art. I, ¶1; Art. IV, §6, ¶2. So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151, 174, 336 A.2d 713 (1975) (Mount Laurel I); So. Burlington Cty. N.A.A.C.P. v. Mount Laurel Tp., 92 N.J. 158, 208-209, 456 A.2d 390 (1983) (Mount Laurel II).

In 1985, in response to the Mount Laurel rulings, the Legislature enacted the Fair Housing Act, N.J.S.A. 52:27d-301

et seq., L.1985, c. 222, §1, eff. July 2, 1985. The act is intended to satisfy the constitutional obligations enunciated by our Supreme Court in the two Mount Laurel decisions. N.J.S.A. 52:27D-302 creates COAH and endows that agency with the powers to define housing regions within the state and the regional need for low and moderate income housing, along with the power to promulgate guidelines for municipalities to determine their fair share of their regions' needs. The council is also empowered to decide whether the proposed ordinances and related planning steps will satisfy a particular community's Mount Laurel obligations.

The Act further provides for all pending and future Mount Laurel cases to be transferred to COAH, except where, in

cases filed more than sixty days before July 2, 1985, such transfer would result in "manifest injustice to any party to the litigation." N.J.S.A. 52:27D-316.

By letter dated January 23, 1986, Judge Gibson transferred the discriminatory housing suit against Cherry Hill to COAH.

By resolution dated March 2, 1987, COAH found that the regional housing element and fair share plan (N.J.S.A. 52:27D-309) submitted by Cherry Hill contained certain deficiencies which the municipality was given sixty days to correct. Thereafter, by resolution dated April 29, 1987, COAH determined that land was a scarce resource in Cherry Hill, and issued an order restraining the municipality from granting any type of develop-

ment approval for any parcel of land of two or more acres. The restraint was issued pursuant to N.J.A.C. 5:91-11.1:

> At any time, upon its own determination, or upon the application of any interested party, and after a hearing and opportunity to be heard, the Council may issue such orders as may be necessary to require that a participating municipality take appropriate measures to preserve scarce resources that may be essential to the satisfaction of the municipality's obligation to provide for its fair share of its region's present and prospective need for low and moderate income housing.

This regulation derives its substantive authority from Hills Dev. Co. v. Bernards Tp. in Somerset County, 103 N.J. 1, 510 A.2d 621 (1986) (Hills Development):

> We have concluded that the Council has the power to require, as a condition of its exercise of jurisdiction on an application for substantive certification, that the applying municipality take appropriate

> measures to preserve "scarce resources," namely, those resources that will probably be essential to the satisfaction of its Mount Laurel obligation. [Id. at 61, 510 A.2d 621].

COAH denied plaintiff's petition for exemption from the development moratorium.

The negotiation process between Cherry Hill and COAH was unproductive. Because the municipality failed to make the necessary correction to the housing element and fair share plan required by COAH pursuant to N.J.S.A. 52:27D-351b, the agency denied the township's petition for substantive certification of the plan. The denial resulted in remand of the matter to the Law Division and expiration of the vacant land development freeze one month from the September 26,

1988 date of COAH's resolution of denial. By the time that the freeze expired, it had been in effect for about eighteen months.

[1] Plaintiff does not attack N.J.A.C. 5:91-11.1, the regulation pursuant to which the freeze was ordered, nor does he dispute the reasonableness of the freeze or its duration. Instead, he assumes the propriety of the development restriction, but claims that its implementation was a temporary taking of his property without due process of law.

Plaintiff's contention that Cherry Hill is answerable in just compensation damages is clearly without merit as a matter of fundamental procedure. He has not sued Cherry Hill. The township is a party to this action only by virtue of

its joinder by COAH as a third-party defendant. COAH is the only direct defendant and the only party against whom plaintiff has sought relief.

We reject plaintiff's contention that he is entitled to just compensation as a result of the eighteen-month freeze imposed by COAH. He relies upon Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A.2d 881 (1968), in which the landowner sought subdivision of a sixteen-acre parcel to build one-family homes. While the application was pending, Englewood adopted an ordinance placing plaintiff's land on the city's official map and designated it as property re-

served for park use. N.J.S.A. 40:55-1.32 now repealed.[1]

> Upon the application for approval of a plat, the municipality may reserve for future public use the location and extent of public parks and playgrounds shown on the official map, or any part thereof and within the area of said plat for a period of one year after the approval of the final plat or within such further time as agreed to by the applying party. Unless within such one year period or extension thereof the municipality shall have entered into a contract to purchase, or instituted condemnation proceedings, for

---

[1] The successor statute, N.J.S.A. 40:55D-44, continues the one-year freeze provision against development of certain public property, but expressly provides just compensation to the developer for actual loss incurred during the period of temporary reservation and deprivation of use. Just compensation is deemed to be the fair market value of an option to purchase the land for the period of reservation. Other incidental damages, such as taxes and reimbursement for unnecessary expenditure of professional fees in development of the property, are also allowable.

> said park or playground according to law, such applying party shall not be bound to observe the reservation of such public parks or playgrounds.

[2] The potential effect of the statute and its implementation by Englewood's ordinance was to prohibit development of plaintiff's property for one year. The Supreme Court concluded that

> the 'option' for the purchase of land upon the unilateral action of the municipality without any consensual action of the landowner, was statutorily granted to the municipality only upon the implied duty and obligation to make payment of adequate compensation to the landowner for the temporary taking and his deprivation of use. [Lomarch, supra, 51 N.J. at 113, 237 A.2d 881].

Lomarch is distinguishable. That case involved a development moratorium affecting a particular parcel of land. This plaintiff's land is one of several

tracts subject to the eighteen-month development freeze imposed by COAH. The imposition for a reasonable time period of a moratorium on land development for environmental and other public interest reasons does not constitute a temporary taking of an affected landowner's property. Absent extraordinary delay, decreases in the value of property during governmental deliberations are incidents of ownership, and do not result in a taking. Littman v. Gimello, 115 N.J. 154, 163, 557 A.2d 314 (1989) (absent showing of unusual delay in government action, declaration of plaintiff's property as potential hazardous waste facility site not a taking); Wilson v. Long Branch, 27 N.J. 360, 374, 142 A.2d 837 (1958), cert. den. 358 U.S. 873, 79 S.Ct. 113, 3 L.Ed.2d 104

(1958) (no taking because property declared to a be in blighted area); Orleans Builders & Developers v. Byrne, 186 N.J. Super. 432, 446, 453 A.2d 200 (App. Div. 1982), certif. den. 91 N.J. 528, 453 A.2d 851 (1982) (no taking where executive order banned development pending enactment of Pine Lands Protection Act, N.J.S.A. 13:18A-1 et seq., which regulated development in Pine Lands); Meadowland Reg., etc. v. Hackensack, etc., 119 N.J. Super. 572, 578, 293 A.2d 192 (App. Div. 1972), certif. den. 62 N.J. 72, 299 A.2d 69 (1972) (two-year freeze on use of 10,000 acres in Meadowlands pending completion of regional development plan not a taking). Cf. Washington Market Enterprises v. Trenton, 68 N.J. 107, 122, 343 A.2d 408 (1975) (unconstitutional tempo-

rary taking can result where threat of condemnation substantially destroys beneficial use of property for extended periods; plaintiff's commercial building located in area designated as blighted for over ten years until abandonment of blighted designation, during which retail value of plaintiff's property plummeted).

[3] A land development moratorium imposed for the purpose of enabling a municipality to fulfill its constitutional obligation to provide for its fair share of low and moderate income housing is not unconstitutional. Hills Development, supra, 103 N.J. at 61, 510 A.2d 621.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
ATLANTIC COUNTY
DOCKET NO. L-04280-88PW

FRED J. TOCCO,

PLAINTIFF

VS.

TRANSCRIPT OF
RULING
(TELECONFERENCE)

NEW JERSEY COUNCIL ON
AFFORDABLE HOUSING and
TOWNSHIP OF CHERRY HILL,

DEFENDANT.

AT: ATLANTIC COUNTY COURTHOUSE
ATLANTIC CITY, NEW JERSEY
ON: FRIDAY, JULY 7, 1989

BEFORE:
THE HONORABLE L. ANTHONY GIBSON, JSC

ORDERED BY:
S. DAVID BRANDT, ESQUIRE

APPEARANCES:

BRANDT, HAUGHEY, PENBERTHY, LEWIS
AND HYLAND
BY: S. DAVID BRANDT, ESQUIRE
ATTORNEY FOR PLAINTIFF

GERALD CALLAHAN, ESQUIRE
DEPUTY ATTORNEY GENERAL
ATTORNEY FOR COUNCIL ON AFFORDABLE
HOUSING

FRANCINE AXELROD, ESQUIRE
ATTORNEY FOR TOWNSHIP OF CHERRY HILL

KATHY E. DURAND, CSR, CM
OFFICIAL COURT REPORTER
ATLANTIC COUNTY
1201 BACHARACH BLVD, RM 241E
ATLANTIC CITY, NJ 08401

THE COURT: On the line is Geraldine Callahan and David Brandt, This is Tocco vs. Council On Affordable Housing. I'd like to ask that you each state your appearances for the record in Tocco v. COAH, and I'll begin with you, Mr. Brandt.

MR. BRANDT: This is David Brandt, I represent Fred Tocco, the plaintiff.

MS. CALLAHAN: And this is Geraldine Callahan on behalf of the Council on Affordable Housing.

MS. AXELROD: Your Honor, Fran Axelrod on behalf of the third party defendant, Township of Cherry Hill.

THE COURT: The matter which is before me today, and the reason that I've asked counsel to be present, is the remainder of an outstanding motion which was made by Mr. Brandt in behalf of the

plaintiff Tocco. That motion included an application for partial summary judgment, and the matter was first argued before me, I believe, back in January. At that time, although the Court reacted to certain of the issues that were involved in not only the motion by Mr. Brandt, but the cross motion which had been filed, I left open one of the issues in order to obtain further input from counsel. That issue dealt with, particularly, the question of whether the action by COAH which I will describe in some additional detail, represented a taking, thereby entitling the plaintiff to compensation. Further input was submitted to the Court thereafter by counsel, which the Court has had an opportunity to review, and I'm now in a position to complete my ruling.

The precise action that is challenged in this portion of the plaintiff's motion is the determination by the Council On Affordable Housing which established the Township of Cherry Hill as a township with scarce resourses, and as a result of that determination, the restraint, or moratorium, if you will, that precluded the development of all undeveloped land in the Township in excess of two acres while the issue of an appropriate housing plan for the Township was being developed.

The factual background which led to that particular determination is somewhat lengthy and I don't believe it is necessary that I deal with all of it for purposes of this ruling. There are certain events, however, that I think should be highlighted.

First of all, as counsel knows, and is clear, generally, the Legislature of this State passed the Fair Housing Act, which is NJSA 52:27A-301, et seq, in response to our Supreme Court's ruling in the case of Southern Burlington County NAACP v. Mount Laurel Township. Actually, I should say rulings in the plural because there was more than one. Those rulings found that there was a constitutional obligation for communities such as Cherry Hill to provide a fair share of low and moderate income housing. Pursuant to the Fair Housing Act, Cherry Hill was required to submit its housing element and Fair Share Plan to an administrative agency created under that Act, known as the Council on Affordable Housing, which I will refer to in my opinion either as the Council or as COAH.

The initial step in the development of that process included the establishment of certain guidelines and criteria by the Council, and after that was done, a determination was made in connection with a number of municipalities, including cherry Hill, which impacted on the obligation of those communities. Cherry Hill, in an attempt to address the need that had been identified for its geographic boundaries, prepared a resolution and submitted it to the Council for consideration. that was back in 1987. In March of that same year, COAH required Cherry Hill to come before the Council and to show cause why vacant land which existed in Cherry Hill should not be declared a scarce resource and why the Council should not impose restraints on the development of that land. All inter-

ested parties were noticed with respect to the application and a hearing was held, I think on March 16th, 1987.

On April 20, 1987 COAH determined that vacant land in Cherry Hill was a scarce resource and an order was entered that Cherry Hill officials not grant any type of development approvals for any type of land in excess of two acres. The order further provided that projects which received preliminary or final approval, and properties where the owner had sought to add to an existing structure would be exempted from the order. The order further provided that any effected party could seek an exemption from the terms of the order, and the order was to be effective until the Council had formally acted on Cherry Hill's antici-

pated petition for substantive certification.

The plaintiff, Fred Tocco, is the equitable owner, or was the equitable owner at that time of property located in Cherry Hill commonly referred to as the Short Hills Farm site. It consisted of one hundred forty acres, and I think the plaintiff was also the owner at that time of an additional eleven acres in a contiguous site.

In April of 1987, Tocco filed an application for preliminary subdivision approval before the Cherry Hill Township Planning Board and was not able to obtain approval as a result of the prior order. The process continued between Cherry Hill Township and COAH with respect to the certification, and that particular procedural history is, in itself, quite

lengthy and involved. I think, for present purposes, it is sufficient to say that there was a more or less ongoing effort on the part of Cherry Hill and the Council to deal with the housing plan, the approval of a housing plan, although ultimately the Council rejected Cherry Hill's position and remanded the issue of Cherry Hill's obligation to this Court.

In the meantime, the restriction which the scarce resource determination had included continued, and the plaintiff continued to be restricted in the development of the property which had been under agreement of sale and for which he had been the equitable owner. Pursuant to the terms of the restriction by COAH, Tocco was eligible to seek an exemption of his property or a portion of it, from the restraints, as was any other property

owner similarly situated. Tocco made such an application in January of 1988, and by order dated May 2nd, 1988 COAH denied that request. In May of 1988, plaintiff then filed this complaint in lieu of prerogative writ claiming that the actions of the Council in denying plaintiff's use of his property for over, what then constituted, I think, about a year, represented a taking for which the plaintiff was entitled to compensation.

During that same time period, the Council was continuing to review Cherry Hill's plan, and although, as I said, that ultimately resulted in a denial of Cherry Hill's application and a remand to this Court, it's important, I think, to remember that the process was ongoing and being pursued with some diligence.

(Off-the-record discussion).

The only other point that is necessary to refer to, from the factual perspective, is the fact that the total time period which plaintiff claims to have been effectively denied the use of his property was a total of eighteen months. The record should probably also refer to the fact that once the case was back before me an application was made by the plaintiff in separate litigation seeking to continue restraints that had been imposed by COAH, which restraints expired by their own terms during the time period that I was just referring to. This Court did elect to impose a limited injunction against the development of undeveloped lands in Cherry Hill based on the conclusion that there was a scarce resource facing the Court nd the Township. The action of this Court, at least at this

point, has not been challenged by this plaintiff.

And finally, I think I should mention the fact that there was no appeal taken from COAH's actions, and the breadth of the determination by COAH has not been challenged. Instead, it is the length of it and the impact of it which is the focus of this challenge.

Passing now to the legal discussion, the question basically is whether the actions just described by COAH constitute a taking, that is, an unlawful deprivation of the reasonable use of plaintiff's land under all the circumstances described. Plaintiff claims that COAH's restraining order denied it any and all profitable or productive use of his property from April of 1987 through September '88, and that under the circumstances,

that action constituted a compensible taking under the New Jersey Constitution, as well as the Federal Constitution.

There is no real question in this case as to what the applicable standard is with respect to the constitutional obligation, and that obligation is incorporated into the 5th Amendment of our Federal Constitution which provides, in part, that private property shall not be taken for public use without just compensation. Identical language is contained in our new Jersey Constitution in Article One, Section Twenty. Those provisions do not prohibit the taking of private property, but instead, place a condition of compensation on the exercise of that right. Our United States Supreme Court has stated that the Just Compensation Clause, as it is also referred to, was

designed to prevent the government from forcing some individuals to bear public burdens which, in all justice and fairness, should be borne by the public as a whole as opposed to a single individual.

On the other hand, the Supreme Court, and I'm referring now to our Federal Supreme Court, although I think the same has been argued and suggested with respect to certain of the cases of our own Supreme Court, and that is, that guidelines for what constitutes an unlawful taking have not been particularly precise, and as a result, each case has to be examined based on its own peculiar facts.

Some of the circumstances which must be inquired into include the character of the action taken by the governmental entity and the economic impact of that

action on the particular landowner involved, particularly with respect to how that action interferes with the owner's reasonable use expectation. Those guidelines, however, don't create any bright lines for this Court or other Courts, but there is a good deal of guidance from which one can glean,I think, how the actions of COAH here should be viewed, given this challenge.

For example, we know that Mr. Tocco has not been singled out, for example, with respect to the restraint on the use of his property. He is a property owner who is in the same boat, so to speak, as every other property owner who owns two or more acres of land in Cherry Hill, nor is this a situation where the fundamental determination with respect to a scarce resource is being challenged or alleged.

The Supreme Court of this State has specifically authorized the Council, in exercising its jurisdiction, to make determinations, where appropriate, to preserve the resources of a particular community if that is needed in order to satisfy that community's Mount Laurel obligation. So such an authority is not only clear, but municipalities and COAH are directed to consider that particular concept in seeking to satisfy the constitutional obligation which was identified by the Court.

Authority for this proposition is made very clear in the case of Hills Development Company vs. Bernards Township, 103 New Jersey, page one. This particular concept has been codified by COAH through its regulations, and NJAC 5:91-11.1 specifically provides the authority

for restraining orders by COAH in situations in which there is a determination of a scarce resource. So we do know that, in this case, we do not have some of the so-called classic problems that have been identified in those cases where a Court has determined there to be a taking.

There are a number of cases which, in my opinion, support the opposite conclusion. There are a number of cases, for example, in this State and elsewhere which uphold the validity of a so-called moratorium on development where the action by the governmental entity has a reasonable basis in providing and protecting the public welfare. The factual underpinnings for the reasonableness of this action clearly exist, both with respect to the direction of the Supreme

Court in the Hills case, the promulgation of the regulations by COAH generally, and the particular determination, that is, the particular factual determination made by COAH with respect to Cherry Hill in particular. I think it's fair to conclude, therefore, that there is ample support for the conclusion by this Court that the action, insofar as the determination of a scarce resource and the imposition of a restraint in response to that determination, was a reasonable action taken by COAH.

It's also important, I believe to recognize that the action by COAH was tailored. It was widespread in its implication, but it was selective in trying to deal with what would realistically be available for an accommodation of what would ultimately be Cherry Hill's obliga-

tion to provide low and moderate income housing. It was limited to sites in excess of two acres and it also was limited in time. In addition, it included an escape valve by permitting application to be made for exemptions, which the plaintiff sought to take advantage of, and which, as I said, was denied, and that denial was not appealed -- or was it? Am I wrong about that? You didn't appeal that denial, did you, Dave?

MR. BRANDT: No, sir, it was not appealed.

THE COURT: Okay. I think the focus then becomes two fold, whether the time during which this restraint continued was an unreasonable one, and secondly, whether the recent decisions by our U.S. Supreme Court in the zoning area somehow changed the judicial landscape, so to

speak, in this area. And let me deal first with the question of time.

There is no set time that this Court can identify nor which has been suggested to this Court by any of the counsel involved here that would allow me to plug this particular action in order to get a clear result. Once again, it's a matter of examining all the facts and circumstances to determine what is reasonable. There are cases which have been cited which have involved restraints longer than this, some shorter than this. Ultimately, it's for this Court to determine whether, under all the facts and circumstances, an eighteen month restraint in this setting was too much. It's my judgment, that given the burden that the plaintiff has here, and given the factual record before this Court, I'm not pre-

pared to conclude that eighteen months was too much. There was, as I said, an ongoing application and certification process before COAH during this time period in which Cherry Hill actively participated ,and there was available relief from that order which was pursued, but not successful, for reasons that this Court, on this record, must assume to have been valid. That action, I thin, would have been reviewable, and is reviewable in the Appellate Division, but no appeal was taken from it.

In recognizing the process of developing a plan, I think it is also fair to say that the Court can take judicial notice that such a process is not simple and that it involves a good deal of planning and an accommodation of a variety of circumstances which can be quite complex.

This Court has had experience in that process through handling other cases of this type, and to see the process consuming eighteen months or more is not surprising or unexpected,or, in my opinion, again, based on the record before me, unreasonable. So that particular element of the focus is one that I think must be resolved against the plaintiff.

The other element that I mentioned which requires some further review is the notion that the law may have changed in this care as a result of some recent pronouncement by our United States Supreme Court, one being the case of First English Evangelical Lutheran Church v. The County of Los Angeles that is cited at 197 Supreme Court 2378, a 1987 case. The case is lengthy and somewhat complex and I do not intend a thorough analysis of

it, because i don't think it is necessary. I don't think that that case really speaks to the question of what is before this Court. It talks about temporary taking and it makes clear the obligation of a governmental entity to compensate a landowner when there has been a temporary taking. But in that case, the Court assumed the existence of the taking, and what was not before that Court which is before me, is the question of whether there is a taking at all. So although I think it is fair to say, as many scholars have suggested, that the Supreme Court of our country may have signaled a change in direction in this area, that is,the area of the requirement of governmental entities to compensate property owners for the regulations that may be imposed on that property, it is

difficult for me to conclude from that case that the result here should be any different. The signals, to the extent that they exist, don't tell me enough to justify my concluding that the existing case law in New Jersey, for example, can now no longer be relied on with respect to the upholding of the reasonableness of moratoriums. I think it would be necessary for me to reach such a conclusion in order to support the plaintiff's motion, and I don't think that the First English case justifies that conclusion.

That is not to say that future developments in this area may not clarify this question in a way which the plaintiff would support, and I think it is fair to say that further developments are to be expected which could impact on this question, but I don't conclude from that

any mandate or even authority for me to go beyond the conclusion which I have made. And that conclusion is that the action by COAH was not an unreasonable one, either in terms of its scope or its duration, and that I'm not prepared to conclude that the action constituted a taking for which the plaintiff is entitled to compensation.

I will quickly add that this particular question intrigued me a great deal when it was first raised, and continues to intrigue me, because this is an area where I believe there are some interesting, and what I think are competing policy considerations that are difficult to reconcile, and that was one of the reasons that I sought to look at this whole question further after the matter was first considered by me. But having done

so, I don't believe that it is appropriate for this Court conclude other than what I have described.

Interestingly enough, there is a recent case by our own Supreme Court dealing with the question of inverse condemnation. I think it's Littman vs. Gimello, which was decided this year and which is sited at 115 New Jersey 154, and in that case, the Court held that the identification of the plaintiff's property by the Hazardous Waste Siting Commission as a potential site for the construction of hazardous waste facilities did not constitute a compensible taking, even though that determination had had a significant adverse impact ont he ability of the property owner to effectively use his property. The Court concluded that

even though that had occurred, there was not a total deprivation of use.

Our own Supreme Court doesn't seem inclined to follow any lead that may be read into the recent U.S. Supreme Court decisions that have been predicated as restricting the activity of governmental entities in this area, and I think the Littman case is support for that particular observation. And of course, I am bound by the determinations of our Supreme Court in this and other areas. Although I continue to find this whole question of a taking a troublesome one, it is my judgment that, under the facts and circumstances developed before me in this case, the plaintiff's motion should be denied, and that will be the ruling of this Court.

I'm going to ask that Deputy Attorney General submit an order to me consistent with my ruling,and I'm going to now ask each individual counsel to indicate to me whether they have any questions regarding my ruling. Mr. Brandt?

MR. BRANDT: No, I have no question.

THE COURT: Ms. Callahan?

MS. CALLAHAN: The only question I have is, does that mean that Council's crossmotion has been granted, that there is summary judgment, and that would be the end of the case?

(Off-the-record discussion).

THE COURT: Okay, any other questions?

MS. AXELROD: No questions, Your Honor.

MR. BRANDT: Judge, I was just going to make things simpler, since I'm very

confident that you will conclude that you grant Geraldine's motion, there is no need to call me and waste a lot of time, you can just call her and tell her to submit the appropriate order.

THE COURT: All right, fine. Yes, I agree with you, that's what seems very logical and predictable to me, but I just want to make sure that I haven't overlooked something that I should mention in that regard, which I doubt. Okay.

NOTE: ALL ERRORS IN TEXT ARE IN ORIGINAL TRANSCRIPT.

FRED J. TOCCO,
Plaintiff,

v.

COUNCIL ON AFFORDABLE HOUSING,
a statutory body of the State
of New Jersey,
Defendant.

SUPERIOR COURT OF NEW JERSEY
CAMDEN COUNTY
LAW DIVISION
DOCKET NO. L04280-88 P.W.

VERIFIED COMPLAINT IN LIEU OF
PREROGATIVE WRITS

Plaintiff, Fred J. Tocco, being the owner of certain land situate in Cherry Hill Township, Camden County says by way of Complaint:

1. He is the equitable owner of Lots 2, 3 and 3A Block 521 of the Tax Map of Cherry Hill (commonly referred to as the Short Hills Farm Property and known hereafter as the "Property") under an Agreement of Sale for the acquisition of approximately 140 acres, more or less

from John Gilmour. The Plaintiff is also the legal owner of approximately 11 acres located within the interior of the above tract and which is not the subject of the within action.

2. The land is zoned R-1 for single family dwellings and it is the intention of the Plaintiff to develop lots 3 and 3A primarily for that purpose. Lot 2 consists of approximately 8 acres and is intended for commercial development.

3. The Defendant Council on Affordable Housing issued a restraint on April 20, 1987 which prohibits development of any land in Cherry Hill Township of more than 2 acres. This restraint affects plaintiff's property and was allegedly issued to preserve scarce municipal resources necessary to satisfy

the community's obligation under the Fair Housing Act. (N.J.S.A. 52:27D-301.)

4. Plaintiff filed for preliminary subdivision approval before the Cherry Hill Township Planning Board on April 21, 1987 and a public hearing was held on June 15, 1987. Although the Planning Board was prepared to proceed and all other aspects of the application were satisfactory to the Board, no action was taken because of Defendant's restraint. Since that time the restraint has remained in effect. However, Plaintiff moved before the Defendant to exempt its property or a portion thereof on January 29, 1988. The Defendant denied that request on May 2, 1988.

5. The action of the Defendant in this regard has been overly broad and constitutes arbitrary, capricious and

unreasonable action since there is adequate available land to satisfy the requirements of the Fair Housing Act without inclusion of the Plaintiff's property.

6. The Plaintiff has expended in excess of $500,000 per year for land costs, taxes, engineering and legal fees and other expenses during the period of time the restraint has been in effect. These payments have constituted a substantial financial hardship on the Plaintiff and have resulted in irreparable injury to him.

. The denial of Plaintiff's request for exemption and the continuing restraint by the Defendant has substantially destroyed the beneficial use of Plaintiff's property and constitutes a "taking" under the provisions of the

United States and New Jersey Constitutions and thereby requires the payment of just compensation to the Plaintiff.

WHEREFORE, Plaintiff demands judgment against Defendant:

(a) Determining that the restraint imposed by Defendant as it affects Plaintiff's land is a taking of property requiring the payment of just compensation.

(b) For an Order directing the Defendant either to pay to the Plaintiff just compensation or institute condemnation proceedings to fix said just compensation.

(c) For such other relief as the Court may deem appropriate and equitable.

(d) Costs of this action.

BRANDT, HAUGHEY, PENBERTHY, LEWIS & HYLAND, P.A.

By: /s/ Richard S. Hyland
RICHARD S. HYLAND

By:/s/ S. David Brandt
S. DAVID BRANDT

Co-counsel for Plaintiff

DATED: , 1988.

VERIFICATION

I, FRED J. TOCCO, have red the allegations contained in the foregoing Complaint and swear that the allegations contained therein are true based upon my personal knowledge.

/s/ Fred J. Tocco
FRED J. TOCCO

CERTIFICATION PURSUANT TO RULE 4:5-1

I hereby certify that the matter in controversy is not the subject of any other action pending in any Court or of a pending arbitration proceeding. Furthermore, I am unaware of the names of any other parties who should be joined in this action.

/s/ S. David Brandt
S. DAVID BRANDT

Dated: , 1988.

COUNCIL ON AFFORDABLE HOUSING
DOCKET NO.

FAIR SHARE HOUSING CENTER, INC., NEW JERSEY COUNCIL OF CHURCHES, CAMDEN COUNTY BRANCH OF THE N.A.A.C.P. and SOUTHERN BURLINGTON COUNTY BRANCH OF THE N.A.A.C.P.,

Plaintiffs, Civil Action

v. ORDER

TOWNSHIP OF CHERRY HILL, NEW JERSEY,

Defendant.

This matter having been raised by the Council on Affordable Housing sua sponte and heard on March 16, 1987 in the presence of counsel for plaintiffs Fair Share Housing Center, Inc., et al; defendant Township of Cherry Hill; interested party Builders League of South Jersey; Tedco Equities; the Bleznak Organization; Unity Capital Corporation; Norther Lites, Ltd.; KIMCO of Cherry Hill, Inc.; Lone Tree Partnership; Rouse & Associates;

Woodland Falls Associates and Alan Ebert of Springdale Farms appear pro se on the issues of whether vacant land is a scarce resource in the Township of Cherry Hill and further whether, if vacant land is a scarce resource, the Council on Affordable Housing should impose conditions upon the development of vacant land in the Township of Cherry Hill; and

The Council having considered all papers submitted and having heard oral argument; and all parties who might be affected by the imposition of conditions having been notified of the hearing; and for the reasons expressed in the Council's written opinion of even date,

IT IS on this 14th day of April, 1987

ORDERED that the Township of Cherry Hill, the Township of Cherry Hill Plan-

ning Board, Board of Adjustment and Zoning Board and any other person, agent or employee who has the authority to grant any type of development approvals are hereby restrained from granting any type of development approval for the development of any parcel of land of two acres or more in size; and it is further

ORDERED that the following properties shall not be included within the terms of this Order:

1. Those projects which have received preliminary or final site plan approval;
2. Those properties where the owner seeks to add to an already existing structure;

and it is further

ORDERED that the Order entered by the Honorable L. Anthony Gibson, J.S.C.

on January 23, 1986 shall remain in full force and effect; and it is further .

ORDERED that this Order shall remain in full force and effect, unless otherwise modified by the Council, until the Council acts upon Cherry Hill's Petition for substantive certification.

COUNCIL ON AFFORDABLE HOUSING

By/s/ Arthur R. Kondrup
Arthur R. Kondrup
Chairman

wp4327.pfm/0191-11